**STATE OF MICHIGAN**
**IN THE SUPREME COURT**

ROBERT MARTIN and CATHY MARTIN,

Plaintiffs-Appellees,

v. Docket No. 120932

DAVID A. BEALDEAN, et. al.

Defendants,

and

JOHN R. REDMOND and BARBARA E. REDMOND, EDWARD DAVIES and KAREN A. DAVIES, SAMUEL D. BRANDT and LOIS A. BRANDT,

Defendants-Appellants.
_____/

# BRIEF ON APPEAL – APPELLANTS

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## STATEMENT OF BASIS OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to MCR 7.301(A)(2) and MCR 7.302. Appellants filed a timely Application for Leave to Appeal on February 4, 2002. Appellants' Application for Leave to Appeal was granted by this Court's Order dated March 25, 2003.

## STATEMENT OF THE QUESTIONS INVOLVED

**I. WAS A PRIVATE RIGHT CREATED BY THE RECORDING OF THE PLAT AND SUBSEQUENT RELIANCE ON THE PLAT?**

The Trial Court failed to answer this question.
The Court of Appeals answer was "no."

Plaintiff-Appellees' answer is "no."
Defendant-Appellants' answer is "yes."

**II. HAD TITLE VESTED IN DEFENDANTS SO THAT PLAINTIFFS WERE NOT ENTITLED TO TERMINATE THE DEDICATION BY THE MEANS USED IN THE CIRCUIT COURT?**

The Trial Court's answer would presumably be "no."
The Court of Appeals answer was presumably "no."

Plaintiff-Appellees' answer is "no."
Defendant-Appellants' answer is "yes."

**III. REGARDLESS OF THE LABEL PLACED ON THE RIGHTS CREATED UNDER THE PLAT, CAN SUCH PLATTED RIGHTS ONLY BE EXTINGUISHED THOUGH PROCEDURES CONTAINED IN THE PLAT ACT AND NOT BY JUDICIALLY CREATED EXEMPTIONS TO THE ACT?**

The Trial Court's answer was "no."
The Court of Appeals' answer was "no."

Plaintiff-Appellees' answer is "no."
Defendant-Appellants' answer is "yes."

**IV. DID THE LOWER COURTS' HOLDING VIOLATE THE SUBDIVISION CONTROL ACT BY ALLOWING PLAINTIFFS TO TERMINATE THE RECORDED DEDICATION WITHOUT FILING A PETITION TO VACATE THE PLAT?**

The Trial Court's answer would presumably be "no."
The Court of Appeals answer was presumably "no."

Plaintiff-Appellees' answer is "no."
Defendant-Appellants' answer is "yes."

## STATEMENT OF FACTS

This case involves Tan Lakes Subdivision, in Oxford Township, Oakland County, Michigan. In November 1969, Jarl Corporation, the subdivision's developers, filed a plat dividing a parcel of land into 21 lots and three outlots. An outlot is "an area of land on a plat which is to be used for a purpose other than a building site." Black's Law Dictionary, 6th Edition (1991). Contained in the Tan Lakes plat was the following dedication:

> Outlot A is reserved for the use of the lot owners; Outlots B & C are for an ornamental gateway to the subdivision and none may be used for building sites

(Appellants' Appendix at 29; Exhibit A to Defendants' Motion for Summary Judgment)

Outlot A is lakefront property. At the time the plat was recorded, this outlot consisted of two distinct parcels. One of the parcels is level with the water and has been used by other lot owners since the inception of the dedication for such activities as swimming and launching boats. (Exhibit B to Defendants' Motion for Summary Disposition) The remaining portion of Outlot A, while also on the lake, has a steep drop to the water and so is not favorable for lake access. It has seldom been used by the lot owners, and is not in dispute.[1] In contrast, the disputed portion of Outlot A is level with the lake and thus ideal for launching boats for those lot owners who live on the canal side, and for lakefront owners whose lots have a steep incline to the lake. Consequently, this portion of Outlot A has consistently been used as a boat launch for the neighborhood. (Id.)

Outlot A is adjacent to Lot 21. At the time of the dedication, James E. Fritch owned Lot 21 as well as the disputed portion of Outlot A. Mr. Fritch was a signatory to the dedication,

[1] This portion of Outlot A reverted to the State Treasury Department for non-payment of property taxes, and in 1991 was deeded by the Treasurer to the Michigan Department of Natural Resources. See Exhibit C to Defendants' Motion for Summary Disposition.

however, which reserved the entire Outlot A, including the portion he owned, for use by all of the Tan Lake Subdivision lot owners. Nevertheless, in 1976, Mr. Fritch executed a deed purporting to transfer not only Lot 21 but also the disputed portion of Outlot A. All subsequent transfers of Lot 21 also purported to transfer the disputed portion of Outlot A. The remaining lot owners in the subdivision had no notice that Mr. Fritch and all subsequent owners of Lot 21 claimed an interest in a portion of Outlot A. There were never any physical signs of any claim of ownership of Outlot A, by any of Lot 21's owners. (Exhibits B and D to Defendants' Motion for Summary Disposition)

Prior to Plaintiff-Appellees' purchase of this property, Lot 21 and Outlot A was undeveloped vacant land. (See Exhibit C to Defendants' Motion for Summary Disposition) While most of the other lots in the subdivision contained year-round homes, Lot 21, as a vacant lot, was owned by an absentee landowner. Because they were absentee landowners, the prior owners of Lot 21 would have had no way of knowing whether other lot owners were using Outlot A.

In 1996, Plaintiff-Appellees purchased Lot 21. This transfer again purported to transfer the disputed portion of Outlot A along with Lot 21. After Plaintiffs purchased this property, they built a home on Lot 21. Their asserted claim of ownership to any portion of Outlot A soon was questioned. Plaintiffs then brought a quiet title action in the circuit court regarding the disputed portion of Outlot A. Defendants filed an answer challenging this claim. Plaintiffs argued that they owned this portion of Outlot A because their predecessor in interest, Mr. Fritch, had transferred this portion of Outlot A, subsequent to his signing the dedication. After Mr. Fritch had signed the dedication, however, he had no interest in Outlot A to transfer to anyone.

Plaintiffs could not have received title to Outlot A from someone who no longer had title to transfer.

Plaintiffs also argued in the trial court and again in the Court of Appeals that the dedication of Outlot A expired twenty-five years after the dedication. They based this argument on deed restrictions executed in 1969, at the same time that the plat was recorded. The restrictions include the following paragraphs:

> 17. All restrictions, conditions, covenants, charges, easements, agreements and rights herein contained shall continue for a period of twenty-five years from date of recording this instrument. . . .
>
> 19. The subdividers are in the process of *subdividing other and further lands* in the area and adjacent to Tan Lake Shores Subdivision which *further subdivision* will include certain "outlots" to be reserved for recreational purposes and it is the intent of the subdividers that such "outlots" when dedicated will be for the use and benefit of the residents of Tan Lake Shores Subdivision as well as the residents of later subdivision. (Emphasis added)

(Exhibit E to Defendants' Motion for Summary Disposition)

On September 24, 1999, the Honorable Alice L. Gilbert entered an order granting Plaintiffs' Motion for Summary Disposition. This order specifically found that Plaintiffs had the exclusive right to the property in dispute. The court based this decision on laches or estoppel, finding that Defendants had waived their rights to rely on the dedication by their non-use of the disputed parcel. The court did not actually decide whether the disputed portion of Outlot A had been dedicated to the use of all of lot owners. (App. at 25-26)

The circuit court did conclude, however, that the twenty-five year limitation found in the deed restrictions did not affect the plat that contained the dedication of Outlot A. The court held that "the language of the dedication and restrictions are unambiguous. The restrictions are

inapplicable to Outlot A as it pertains to the facts at issue." (Id.) Defendants then filed a timely claim of appeal of the trial court's September 24, 1999 decision.

The Court of Appeals affirmed, holding that the lower court had properly granted summary disposition in favor of Plaintiffs. (App. at 15-24) The court based its decision on completely different grounds than those of the trial court. The Court of Appeals held that, as a matter of law, Plaintiffs owned the disputed parcel. The Court relied primarily on a distinction between private and public dedications, and concluded that there can be no private dedications of land.

The Court further held that, in the absence of a lawful dedication, the subdivision's lot owners acquired from the plat only a private contractual right or a restrictive covenant for the use of Outlot A. Reading the deed restrictions and the plat as a single document, the Court determined that Paragraph 17 of the recorded restrictions did apply to the right of all lot owners to use Outlot A. According to the Court, that right no longer existed because more than twenty-five years had elapsed from its creation.

Defendant-Appellants filed a Motion for Rehearing on November 16, 2001, asserting that the Court of Appeal's decision was inconsistent with established case law and contrary to legislative acts. The Michigan Attorney General's office sought leave to appeal as amicus curiae, also arguing that the opinion was contrary to the case law and legislative acts of the State of Michigan, and would cause harm by circumventing the established procedure for vacating, amending or modifying a plat. The motion to file an amicus curiae brief was granted but the motion for rehearing was denied. (App. at 27)

Defendants next sought leave to appeal to this Court, which was granted on March 25, 2003. The Court ordered that this case be argued and submitted along with the case entitled

Little v Hirschman, in which a Court of Appeals panel had reversed a trial court decision, relying on the Court of Appeals decision in Martin v Beldean.

## ARGUMENT

Appellant landowners request the reversal of both the Court of Appeals and the trial court decisions, because, as a matter of law, Appellants' Motion for Summary Disposition should have been granted, and Appellees' Motion should have been denied.

The courts below made several errors. First, the Court of Appeals determined that private dedications are not permitted under Michigan law. This ignores Michigan legislation that, at least since 1925, has recognized the existence of private dedications. The Plat Acts of 1925 and 1929 and the Subdivision Control Act of 1967 all authorized the creation of private dedications of land. These Acts permit such dedications so long as they are clearly stated in the dedication. Secondly, even if private dedications are not allowed, the dedication in this case qualifies as a public dedication. More to the point, whatever the court chooses to call the right of the subdivision owners to use Outlot A, that right was contained in a duly approved and recorded plat, consonant with the plat laws enacted by the legislature of this State. As the basic tool of land development and planning in Michigan, plats are inviolate, and can only be modified by the procedures provided by plat legislation. There was no basis in law for the Court of Appeals to terminate the Tan Lakes Subdivision plat pursuant to the deed restrictions that terminated such restrictions after twenty-five years. There also was no basis in law for the trial court to apply the equitable doctrines of waiver and laches to transfer ownership of Outlot A from the subdivisions lot owners to Plaintiffs. If Plaintiffs wished to assert an exclusive ownership right in Outlot A, their sole recourse was to file an action to vacate the plat. The decisions of the courts below, however, have undermined the very integrity of this state's plat legislation, and should be reversed.

## *I. STANDARD OF REVIEW*

In cases such as this, where the court is confronted with questions of law, the appropriate standard of review is de novo. Veenstra v Washtenaw Country Club, 466 Mich 155; 645 NW2d 643 (2002). This standard is applicable to all issues raised in Appellants' Brief on Appeal.

## *II. THE RECORDING OF THE TAN LAKE SUBDIVISION PLAT AND SUBSEQUENT RELIANCE CREATED PRIVATE RIGHTS THAT CANNOT BE EXTINGUISHED EXCEPT PURSUANT TO STATUTORY PROCEDURES*

### A. The Plain Language Of The Subdivision Control Act Of 1967 And Its Predecessors Permit Private Dedications Of Land To Subdivision Lot Owners

The Court of Appeals held in this case that there can be no private dedications of land. This is an incorrect interpretation of established Michigan law. Dedications are governed by plat laws, which have long permitted private dedications. The Plat Acts of 1925 and 1929 both specifically permitted private dedications of land. The 1925 Act stated in pertinent part:

> There shall be printed on said plat a form of dedication, stating the name of plat, that the lands embraced in said plat have been surveyed and platted and that the public streets, alleys and other public places shown on said plat are dedicated to the use of the public, and if there be any street, park, or other places which are usually public but are not so dedicated on said plat the character and extent of the dedication of such street, park or other public place shall be plainly set forth in said dedication.

1925 PA 359. The statute's reference to places "usually public but not so dedicated . . . shall be plainly set forth in such dedication" certainly indicates the legislature's recognition that dedications would contain parcels of land that were not dedicated to the public – in other words, private dedications.

This principle was carried over into the 1929 Plat Act, which established even more clearly that private dedications were permitted under the law. That Act provided that "all roads

or streets which are not dedicated to public use, shown in the plat shall be marked 'private roads.'" The Act then repeated the language of the 1925 Act:

> If there be any street, park, or other places which are usually public, but are not so dedicated on the plat, the character and extent of the dedication of such street, park or other public place shall be plainly set forth in the dedication.

1929 PA 172.

The Subdivision Control Act of 1967, MCL §§560.101 et seq., continued what had long been the established legislative intent -- to allow private, as well as public, dedications. MCL §560.253 (1) states:

> When a plat is certified, signed, acknowledged and recorded as prescribed in this act, every dedication, gift or grant to the public or any person, society or corporation marked or noted as such on the plat shall be deemed sufficient conveyance to vest the fee simple of all parcels of land so marked and noted, and shall be considered a general warranty against the donors, their heirs and assigns to the donees for their use for the purposes therein expressed and no other.

In announcing that private dedications are not permitted in this state, the Court of Appeals ignored the plain language of the statutes at issue. The most basic principle of statutory interpretation is that every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used. Western Michigan Univ Bd of Control v State, 455 Mich 531; 565 NW2d 828 (1997). The 1925 and 1929 Acts both refer to non-public dedications. In addition, the Subdivision Control Act of 1967 refers to "every dedication, gift or grant to the public *or any person*". MCL §560.253(1) The plain and ordinary meaning of all three acts authorize private dedications.

Under the Subdivision Control Act, as well as its predecessor Acts, the legislature expressed its recognition of private dedications. These Acts all establish that private individuals can receive the benefit of a recorded dedication, separate and apart from the public nature of

such dedication. Moreover, private dedications themselves are clearly permitted. The Court of Appeals' decision renders all three Acts null and void with regard to private dedications.

Not only is there legislative support for private dedications, numerous Michigan courts also have recognized that portions of a subdivision may be dedicated to the private use of the subdivisions' lot owners. In Schurtz v Wescott, 286 Mich 691; 282 NW 870 (1938), the Supreme Court affirmed a trial court decision that the subdivision lot owners had the right to use the park at issue, in common with other lot owners. Id. at 696. The trial court had held that the parks were not public parks and the defendant township did not hold the parks in trust for the public, as is true for a public dedication. Instead, the trial court held that "ownership of any lot in the plat carried with it private rights to use of the parks." Id. at 694.

In a subsequent case, this Court cited Schurtz for exactly that proposition – that the "sale of lots with reference to a plat in which areas are designated as parks passes to the purchasers of the lots a common right to use such areas for park purposes." Kirchen v Remenga, 291 Mich 94, 104; 288 NW 344 (1939).

In Hooker v City of Grosse Pointe, 328 Mich 621, 630; 44 NW2d 134 (1950), this Court applied the 1929 Plat Act, noting that, under that act, "private roads were permitted in a dedicated plat." While the Court ultimately determined that a "private way in a public street was inconsistent with the uses and purposes of a public street and therefore void," the Court also recognized the principle at issue today – that there can be private dedications.

Finally, the Court of Appeals, in Feldman v Monroe Township Board, 51 Mich App 752, 753; 216 NW2d 628 (1974), held that a "private dedication is 'irrevocable' upon the sale of lots by reference to the plat and the grantees of the dedicators are bound by the dedication." In reaching this conclusion, the court relied upon Kirchen v Remenga, supra. The court stated that

the Kirchen decision provided guidance "as to the legal theory under which private dedications occur." Id. The court stated that:

> The purchasers of lots in the original plat took not only the interest of the grantor in the land described in their respective deeds, but, as an incorporeal hereditament appurtenant to it, took an easement in the streets, parks and public grounds mentioned and designated in the plat as an implied covenant that subsequent purchasers should be entitled to the same rights. The grantors could not recall this easement and covenant any more than they could recall other parts of the consideration. They added materially to the value of every lot purchased.

Id. at 754-55.

As in Feldman, the use of the instant outlot added materially to the value of every lot purchased by a resident of the Tan Lake Subdivision. Moreover, the Feldman court found that these easement rights were not extinguished by mere nonuse. Id. at 755. Even if Defendant-Appellees in the instant case did not use the dedicated lands (which the evidence before the trial court indicates is not true), "mere nonuse, no matter how long, will not constitute an abandonment in an easement created other than by prescription unless accompanied by some Act which manifests a clear intent to abandon." Id., quoting from First National Trust & Savings Bank v Smith, 284 Mich 579, 588; 380 NW 57 (1938). Not only did Defendant-Appellants in the instant case have a private dedication for their benefit, they also had an easement right that could not be extinguished simply by non-use.

In contrast, the cases relied upon by the Court of Appeals either involved public dedications, or involved private dedications made prior to the 1925 Plat Act that permitted private dedications.

In Kraushaar v. Bunny Run Realty Co, 298 Mich 233; 298 NW 514 (1941), the park that was dedicated was available to the public, and not just by the residents of the subdivision. The landowners sued to obtain the exclusive right to the dedicated parcel, to the exclusion of the public. The specific language of the dedication, though, was "to the use of the *public.*" The

Court did not dismiss the rights of the landowners in the subdivision to have the benefit of the dedication and in fact, the Court maintained the right of the private individuals to receive the benefit they were entitled to under the plat. Id. The Kraushaar decision thus cannot serve as a basis for the legal conclusion that private dedications are forbidden, since the dedication at issue before that court was a public dedication.

Similarly, in Atty Gen ex rel Dept of Natural Resources v Cheboygan Cty Bd of Road Comm'rs, 217 Mich App 83; 550 NW2d 821 (1996), on which the lower court also relied, the court addressed a purported dedication from one governmental entity to another. The court held that such a transfer could not constitute a dedication because "the doctrine of dedication and acceptance is simply inapplicable as between two governmental entities concerning jurisdiction over a road." Id. at 89. Again, because that case did not address a dedication made for the private use of lot owners, the Court of Appeals' reliance on the case is misplaced.

The Court of Appeals also relied on Kraus v Department of Commerce, 451 Mich 420, 547 NW2d 870 (1996), to support its finding that there must be a clear intent to dedicate the property for public use. Again, unlike this case, Kraus addressed a public dedication, not a private dedication. Moreover, the cases in Kraus addressed dedications made prior to the 1925 Act. Because of this, the legislative action allowing private dedications was not in effect. Consequently, Kraus was decided based on common law prior to 1925 and does not control the instant case.

The Court of Appeals' reliance on Patrick v. Young Men's Christian Ass'n, 120 Mich 185, 79 NW 208 (1899) also was misplaced. The plat at issue in Patrick was recorded in 1831, prior to subsequent legislation that provided for private dedications. Patrick was decided under the common law, which did not provide for private dedications. In contrast, the present case is

controlled by statutory law, which does provide for private dedications. In concluding that private dedications are not permitted in Michigan, the Court of Appeals erred in its interpretation of that law. Its decision should be reversed.

## B. Even If The Dedication In This Case Were Public, Appellants Nonetheless Acquired Private Rights, Governed By The Plat Acts, That Cannot Be Extinguished Except As Provided By Those Acts

While under the common law, private dedications may not have been recognized, courts nonetheless recognized the existence of some form of private rights in a public dedication. This is illustrated in Pulcifer v Bishop, 246 Mich 579, 225 NW 3 (1929). Pulcifer addressed the state of the law prior to the 1925 and 1929 Acts. In Pulcifer, the dedicated property was transferred subsequent to the dedication. The Court upheld this post-dedication transfer because, prior to 1925, only public dedications were permitted, and the public had not accepted this dedication. The dedication therefore had not been completed. The Court nevertheless held that the other lot owners maintained private easement rights in the property for the purposes indicated in the dedication. The Court stated that "it is the rule in this and other States that the platting and sale of lots constitute a dedication of streets, etc., delineated on the plat, as between the grantors and purchasers from them." Id. at 582. The Court went on to find that there are "certain rights in the grantees of the original owner, which, as between the grantor and the grantee, are irrevocable in their nature." Id., quoting Dillon on Municipal Corporations (5th Ed.), Sec. 1090.

This Court affirmed its Pulcifer analysis in Rindone v Corey Com. Church, 335 Mich 311, 55 NW2d 242 (1952). Relying on Pulcifer, the Court in Rindone held that the defendant church did acquire private rights to the streets based on the plat. As in the present case, the defendant in Rindone used the property in reliance on the dedication, regardless of whether there

was public acceptance. The Court therefore was justified in holding that the defendant had acquired rights in the plat.

Both legislative acts and cases decided by the courts of this state establish the validity of private dedications. Furthermore, even public dedications have been held to result in private rights when the dedication is recorded in the Plat Acts. The Court of Appeals' determination that there can be no private dedications conflicts with prior decisions of both the Court of Appeals and the Supreme Court, as well as with legislation enacted by this state. This Court should reverse the decision of the Court of Appeals.

## *III. EVEN IF A PRIVATE DEDICATION WAS NOT CREATED, INCLUSION OF THE LANGUAGE IN THE PLAT NEVERTHELESS RESULTED IN TITLE VESTING IN THE LOT OWNERS OF THE SUBDIVISION*

### A. Once The Dedication Was Made There Was No Interest To Be Transferred To Plaintiffs So Title Could Not Be Vested In Them.

Outlot A was dedicated for the use of the lot owners in Tan Lakes Subdivision on November 26, 1969. The dedication stated simply that "Outlot A is reserved for the use of the Lot Owners . . . . " The dedication included eighteen signatures, including representatives of Jarl Corporation and the lot owners of what is now Tan Lakes Subdivision. One of the signatures is that of James Fritch who, at the time, owned Lot 21 and a portion of Outlot A, the same property that Plaintiff-Appellees now claim to own.

The dedication of Outlot A was recorded in the plat. MCL §560.253 (1) states:

> When a plat is certified, signed, acknowledged and recorded as prescribed in this act, every dedication, gift or grant to the public or any person, society or corporation marked or noted as such on the plat shall be deemed sufficient conveyance to vest the fee simple of all parcels of land so marked and noted, *and shall be considered a general warranty against the donors, their heirs and assigns* to the donees for their use for the purposes therein expressed and no other. (Emphasis added)

All of the lot owners of Tan Lakes Subdivision thus received title in fee simple to all of Outlot A at the time the plat was recorded. All of Outlot A therefore was owned by all of the lot owners at that time and their title was held to be warranted by the donor and his assigns -- including Plaintiff-Appellees.

Plaintiff-Appellees argued in the trial court that Outlot A historically was two separate parcels, and consequently the dedication did not apply to the portion in dispute. The dedication, however, does not support this argument, because the dedication does not contain any reference to or evidence of a distinction between the portions of Outlot A. Nonetheless, Plaintiff-Appellees relied on a series of deeds dated both before the dedication and after. They argued that because there was a history of conveying the subject portion of Outlot A with Lot 21, before and after the dedication, the dedication did not include this portion of Outlot A. Plaintiff-Appellees failed to present any evidence, though, that this was the result intended by Fritch at the time of the dedication, and of course, the language of the dedication shows the contrary. Fritch, as owner of the disputed parcel (and indeed, the owner of the entire Outlot A), signed the dedication, transferring his entire interest in Outlot A. Showing that Fritch transferred the same property after the dedication is not evidence that the disputed property was not intended to be included in the dedication. Instead, it is more likely that he mistakenly failed to update the legal description at the time of the subsequent transfer. In any event, Mr. Fritch did not own any portion of Outlot A after November 26, 1969, and could not have transferred this property to Plaintiffs' predecessors or anyone else.

Even if Outlot A was conveyed as two separate parcels, this does not render the dedication void. Mr. Fritch and the owner of the other portion of Outlot A conveyed the entire Outlot as a dedication. No contrary intent was evident at the time of the dedication, nor was any

limitation placed on the dedication. Instead, the dedication states "Outlot A is reserved for the use of the Lot Owners." Any further conveyances of any part of Outlot A conflicted with the dedication and therefore title to any portion of Outlot A could not have been conveyed, since title to Outlot A had already vested in the subdivision owners, pursuant to MCL §560.253(1). In fact, Fritch's signature on the dedication evidences his intent to convey the entire Outlot A to the lot owners. If Mr. Fritch had intended to retain his portion of the Outlot, he certainly would not have signed a dedication that so clearly divested him of his property.

All of Outlot A thus was reserved for the use of the other lot owners at the inception of this subdivision. The subsequent owners of Lot 21 did not have title to any portion of Outlot A. Therefore, the conveyances of part of Outlot A in conjunction with Lot 21 after this dedication did not convey any interest to Plaintiff-Appellees.

### B. The Dedication Is Still Valid With Regard To Appellants' Interests Because The Deeds To Their Properties Were Conveyed In Reliance On The Recorded Plat And Because The Original Conveyor Of The Outlot Has Not Withdrawn His Offer To Dedicate.

Defendant-Appellants have rights in Outlot A that cannot be withdrawn by Plaintiff-Appellees. These rights cannot be withdrawn for two reasons. First, each lot owner received a deed referring to Tan Lake Shores Subdivision, as recorded in Oakland County Plats. Such plat contains a dedication of Outlot A, which states that Outlot A is reserved for the use of lot owners. This constituted a dedication between the grantor and the other lot owners, including Defendant-Appellants. Pulcifer, supra. Secondly, Plaintiff-Appellees have never filed an action to vacate the dedication, which is the only way that the plat can be changed.

Plaintiff-Appellees argued below that the dedication had failed because there has been no public acceptance of the dedication. They contended that James Fritch's subsequent conveyance

of a portion of Outlot A was a withdrawal of the offer of dedication, made prior to public acceptance. First, this subsequent conveyance is not sufficient to establish an "inconsistent use" of the property. In support of their claim, Plaintiff-Appellees relied on Kraus, arguing that an attempted transfer of property is sufficient to establish a withdrawal of the offer. The landowners in Kraus actually used the property in a manner inconsistent with public use, unlike in this case. In the present case, no improvements were been made to the Outlot prior to Plaintiffs' purchase of the property. In fact, the lot owners of the other lots in the subdivision accepted the dedication through their use of Outlot A. Moreover, Kraus involved a public dedication, as opposed to the private dedication involved in this case. Defendant-Appellants therefore are entitled to their use of the Outlot, as recipients of a private dedication.

Additionally, the landowners in Kraus brought an action to vacate the streets, including the public entity as a party. In the instant case, Plaintiffs never brought such an action, instead alleging that, because there is no public acceptance, they should receive the property based solely on that alleged non-acceptance.

This argument must fail. The appropriate remedy for obtaining title to property dedicated in a plat is file an action to vacate, alter or amend the plat, pursuant to the relevant statute. This was not done in the instant case. Once the property was dedicated, title to Outlot A vested in all lot owners whose deeds were issued subject to the recorded plat.

## *IV. REGARDLESS OF HOW THE RIGHTS OF THE SUBDIVISION LOT OWNERS CREATED UNDER THE PLAT ARE DESCRIBED, THEY CANNOT BE EXTINGUISHED EXCEPT THROUGH VACATION OF THE PLAT ITSELF*

There is no question that the Tan Lakes Subdivision has been platted, and there is no question that the plat names Outlot A and states that it is to be used by the subdivision lot owners. Regardless of the label that is attached to that transfer – whether it is a private dedication, a public dedication with private rights as in Pulcifer, or, as the Court of Appeals stated, a private contractual right or restrictive covenant – the fact remains that it is a platted right. Platted rights are not the same as other real property conveyances. Platted rights are governed not by the common law but by statutory law, which sets forth detailed procedures for both the creation and amendment of plats. The special rights conferred through a plat cannot be subject to the type of judicial exception applied by the lower courts in this case. Nothing in the plat acts authorizes courts to modify a platted right, unless the provisions of the plat acts have been met. If judicial tinkering with platted rights is permitted, it can only serve to make plats less useful devices for land development, in contravention of the plat acts themselves.

### A. As The Fundamental Tool Of Land Organization, Rights Established By Plats Are Inviolable

Plats have been the primary tool of land development, use and organization in this state for more than one hundred and fifty years. Plat Acts have existed since at least 1821, when 1821 Terr Laws 816 created the first system of platting. In 1839, the Michigan Legislature enacted the first plat act for the newly formed state – Rev. Stat. 1839. When that act was amended in 1850, by means of 1850 PA 86, it stated that the recording of a plat was to be evidence that the parties

acknowledged that transfer as a dedication. The 1867 amendments set forth in greater detail the procedures to be followed for vacation or amendment of a plat, and the standard of evidence necessary for such a vacation. 1867 PA 186.

The 1839 Act was significantly amended in 1925, 1927 and 1929. The 1929 Act stood primarily unchanged until the 1967 Subdivision Control Act, MCL §§560.101 et seq. The Act was again amended in 1996, when it was renamed the "Land Division Act."

Throughout all of these refinements, the essential purpose of the Plat Acts has remained static and inviolate: "to regulate the division of land, to promote the public health, safety, and general welfare; to further the orderly layout and use of land." MCL prec §560.101 As noted by this Court in Hooker v City of Grosse Pointe, 328 Mich 621, 630; 44 NW2d 134 (1950), "platting is statutory." The legislatively stated purposes of the Act were confirmed by this Court in White v City of Ann Arbor, 406 Mich 554, 572; 281 NW2d 283 (1979), and by the Court of Appeals in CPW Investments #2 v City of Troy, 156 Mich App 577, 579; 401 NW2d 864 (1986)("The SCA provides a comprehensive statutory scheme concerning the regulation of the subdivision of land.")

In light of almost two centuries of public reliance on the Plat Acts as the ultimate source of rules for land organization in Michigan, courts must be extremely cautious about changing the rights of land ownership granted in a plat. Hundreds of subdivisions throughout the state are governed by plats, recorded years ago, which contain dedications of land to the lot owners – land to be used as common areas, parks, and ornamental entryways. These landowners believe that their rights are set forth in and protected by the plats that organized their subdivision. Those rights should not and cannot be overridden by court decisions.

## B. Rights Established By Plat Cannot Be Terminated By Reference To Restrictive Covenants Recorded Simultaneously

The Court of Appeals concluded that the rights of the Tan Lake Subdivision landowners were extinguished twenty-five years after the dedication because deed restrictions, not contained in the plat but recorded at the same time, contained a twenty-five year limitation on all deed restrictions. There was no basis in the law for the Court to take such an action, and it should be reversed.

Nothing in the plat itself restricts any of its dedications to a twenty-five year period. Nothing in the plat itself incorporates by reference the deed restrictions agreed to by the Tan Lake subdivision owners. Actually, the Court of Appeals read the deed restrictions as incorporating by reference the plat language. Nothing in Michigan law supports such a conclusion.

Only when a deed restriction is ambiguous should the Court look to other documents to resolve the ambiguity "Where the language of the restriction is clear, the parties will be confined to the language which they employed." Sampson v Kaufman, 345 Mich 48, 53; 75 NW2d 64 (1956) See also Webb v Thurlow, 204 Mich App 564, 570-571; 516 NW2d 124 (1994) and Borowski v Welch, 117 Mich App 712, 718; 324 NW2d 144 (1982).

The language of the deed restriction at issue here is far from ambiguous. Paragraph 17 states:

> All restrictions, conditions, covenants, charges, easements, agreements and rights herein contained shall continue for a period of twenty-five years from date of recording this instrument. . . .

In fact, the language is very clear. The paragraph uses the term "herein." "Herein," according to Merriam-Webster's On-line Dictionary, 10th ed. (2003) means "in this". As used in

Paragraph 17, then, it means those restrictions, conditions, covenants, charges, easements, agreement and rights contained *in this* document -- the deed restrictions. Nowhere in this paragraph is there any ambiguity as to which restrictions or covenants are affected. There is no reference to the plat, and there is no justification for applying the deed restriction to a dedication of land contained in the plat.

The Court of Appeals, in its efforts to transfer the right to Outlot A to Plaintiff-Appellees, also looked to Paragraph 19 of the deed restrictions, which notes that "the subdividers are in the process of subdividing other and further lands. . . which will include certain outlots" to be reserved for use of subdivision lot owners. The Court of Appeals opined that this reference to *future* subdivisions, which *might* include *future* dedications, applied to the dedication contained in the original Tan Lake subdivision, merely because these documents were signed on the same day. The trial court correctly rejected this argument, finding that this "paragraph was in the future tense and did not incorporate existing, dedicated outlots." (App. at 26)

A careful look at the impact of the Court of Appeals' decision demonstrates that it cannot stand. If Paragraph 17 is applicable to all of the covenants contained in the plat (according to the Court of Appeals, this is so because they were signed on the same day), then the *entire plat* expires after twenty-five years. This is absurd. Neither the plat nor the deed restrictions contain anything that could be construed as intending to override and extinguish the entire plat.

The case relied upon by the Court of Appeals to support its reading of the plat and the deed restrictions as one document is distinguishable. In that case, West Madison Investment v Fileccia, 58 Mich App 100; 226 NW2d 857 (1975), the court ruled that a letter from the defendant's attorney to the plaintiff advising the plaintiff of a second mortgage was admissible to supplement a warranty deed and prove that there was a second mortgage on the property. This is

far removed from importing a plat into deed restrictions, especially given the implications of the Court of Appeals' decision in this case.

## V. PLAINTIFFS WERE NOT ENTITLED TO TERMINATE THE RECORDED DEDICATION WITHOUT FILING A PETITION TO VACATE THE PLAT

The only way to alter the rights established by a plat is pursuant to the specific and detailed procedures set forth in the Subdivision Control Act (now the Land Division Act.) The sole recourse for anyone – including Plaintiff-Appellees – who wish to assert rights that are contrary to those established by an existing plat is to file a petition to vacate, amend or modify the plat. MCL §§560.221-229 This would be the appropriate action regardless of the nature of the right established by the plat – a private dedication, a public dedication, or some other land use right. As emphasized in the Michigan Attorney General's amicus curiae brief filed with the Court of Appeals, the decisions of both lower courts were contrary to legislative acts allowing for the vacation, modification or amendment of recorded plats. Those decisions will result in uncertainty with regard to recorded Plats. If the courts allow individuals to change dedications recorded on a plat by filing private lawsuits, the public will have no way of knowing whether an existing dedication is valid. Such a result in contrary to public interest and contrary to established legislative intent.

This case was brought in equity, to quiet title of this disputed parcel. The trial court determined that laches or waiver – both equitable remedies – warranted titling Outlot A in Plaintiffs' names.[2] Equity, however, is not an available remedy where there is an adequate

[2] The Court of Appeals held that Defendant-Appellants had waived its right to argue that laches or waiver did not apply to this case, because they did not include that issue in their statement of issues presented. While numerous recent Courts of Appeal decisions have limited their scope of review by relying on this argument, the cited court rule does not clearly state the level of detail that is needed in the statement of issues presented, nor does the court rule advise that failure to explicitly describe every issue will result in waiver of that issue. MCR 7.212(C)(5). Further, many Courts of Appeal panels, while noting that they could decline to consider an argument not adequately noted in a party's statement of issues, nevertheless address the issue on appeal. See, for example, Atkinson v City of Detroit,

remedy at law, such as the vacation procedures set forth in the Subdivision Control Act. Blinkley v Asire, 335 Mich 89; 55 NW2d 742 (1952) In Blinkley, this Court held that "there is no provision in the statute specifying that a party desiring to obtain relief by way of the vacating, altering, amending, or revising of a plat may invoke the aid of equity." Id. at 96. The Court went on to find that such an action is "as action of law" under the Plat Act. Id. at 97.

There is no doubt that platting is statutory. Hooker, supra. The Plat Act provides for actions in law to vacate the plat. Plaintiffs failed to follow the proper procedure for this action. Equity cannot cure this error. Plaintiffs had a remedy at law. Furthermore, had the action been brought under this Act, the Plaintiffs would not have been successful because the issue would be whether the Defendants had any "reasonable objection" to the vacating of the plat. Westveer v Ainsworth, 279 Mich 580, 585; 273 NW 275 (1937). Defendants certainly would have reasonable objections to this action and Plaintiffs would not have been entitled to vacate the plat as a matter of law.

The Court of Appeals' decision, in essence vacating or altering the recorded plat, therefore was improper. The Court of Appeals should have reversed the trial court's grant of Defendants' Motion for Summary Disposition, and ordered the trial court to dismiss the action for failure to state a proper claim. Its failure to do so requires this that Court reverse the decisions of both the trial court and Court of Appeals.

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222 Mich App 7, 11; 564 NW2d 473 (1997). In the present case, the issue presented was "The Dedication Of Outlot A In the Plat Included the Portion In Dispute In This Case." Certainly this statement of Defendant-Appellants' issue includes the argument that neither laches nor waiver work to exempt Outlot A from the plat's dedication. This is especially so because it was on that basis that the trial court granted summary disposition to Plaintiffs.

## CONCLUSION

Contrary to the decision of the Court of Appeals that the law permits only public dedications, private dedications long have been authorized by the Subdivision Control Act and its predecessors and have been upheld by numerous decisions from this Court and the Court of Appeals. The opinion below effectively overrules these decisions.

The confusion that will result from this decision is evident. The procedure for creating a private dedication will no longer be clear. Those relying on existing dedications can no longer be confident that are entitled to dedicated property. This will result in the loss of valuable property rights. In addition, the procedure to be used for vacating a dedication has now been confused by the court's willingness to allow vacation by means of a suit to quiet title, which does not include the important due process notification required in a vacation action.

The extent of the harm that will result if the Court of Appeals decision is left in place was recognized by the Attorney General of Michigan, who filed an amicus brief in the court below, urging the court to reconsider its decision. The sanctity of plats cannot be disturbed. This decision leaves in question the validity of all recorded plats and will result in confusion and the loss of property rights in the state of Michigan. It therefore should be reversed.

Regardless of the label placed upon the right to use Outlot A, created by a duly recorded plat, that right cannot be extinguished as readily as the lower court decisions suggest. Plats are unique, a centuries-old device for land organization and development. Plats are governed by statute and the rights created by platting cannot be subject to judicially created exceptions, such as those applied by the lower courts in this case. Platted rights cannot be eliminated through the application of equitable remedies such as laches or waiver, because the plat acts provide for a

legal remedy for the vacation or amendment of plats. Platted rights also cannot be extinguished by importing deed restrictions into the plat itself. Platted rights can only be modified through the procedures specifically set forth in the Land Division Act. That did not happen here, and so the decisions of both lower courts should be reversed.

## RELIEF SOUGHT

For the foregoing reasons, Defendants request that the trial court and Court of Appeal's decisions be reversed.

Date: May 19, 2003

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**STATE OF MICHIGAN**
**IN THE SUPREME COURT**

ROBERT MARTIN and CATHY MARTIN,

Plaintiffs-Appellees,

v.

Docket No. 120932

DAVID A. BEALDEAN, et. al.

Defendants,

and

JOHN R. REDMOND and BARBARA E. REDMOND, EDWARD DAVIES and KAREN A. DAVIES, SAMUEL D. BRANDT and LOIS A. BRANDT,

Defendants-Appellants.
_____/

PROOF OF SERVICE

I, MICHELLE PERKINS being sworn, state that on May 19, 2003, a copy of Appellant's Brief on Appeal and Appendix and Proof of Service was mailed to Attorney for Appellees Ernest R. Bazzana at 243 West Congress, Suite 800, Detroit, MI 48226-3260, and James Riley, Assistant Attorney General at 300 South Washington Square, Lansing, MI 48913, by placing the documents in the United States Mail, properly addressed, with first-class postage fully prepaid.

Michelle Perkins
MICHELLE PERKINS

Subscribed and sworn to before me this 19 of May, 2003.

Leslie S Clark

Notary Public
Wayne County, Michigan

My commission expires: 9/10/03